In conversation with...
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Akzo: In the Akzo case, the CFI held that, under EU law, legal professional privilege (or LPP) cannot be claimed by in-house lawyers. However, the judgment clarifies the scope of the protection afforded to documents prepared for external lawyers, and the procedure to be followed in disputed cases.

AM&S

Akzo[1] is of course the sequel to the AM&S[2] case of 1982, when the ECJ held that written communications containing legal advice from an independent lawyer could not be seized by the Commission when investigating suspected infringements of the competition rules under Regulation 17 (now Regulation 1/2003). As it happens, I was junior counsel for AM&S in that case, led by JF Lever QC, and I still have the disputed documents somewhere in the archives.

LPP as it exists in common law jurisdictions such as England and Ireland derives, historically, from the procedures for discovery. It has long been held that documents passing between lawyer and client containing legal advice are "privileged" from disclosure in civil proceedings. The "privilege", incidentally, is that of the client, not the lawyer.

The situation in civil law countries is somewhat different. The basic concept is that of the "secret professionnel" i.e. that the lawyer, like the doctor or priest, can never be obliged to disclose what his client has told him in confidence. In AM&S, it was a considerable challenge to see whether a principle of Community law could be forged so as to protect documents containing legal advice, but in the possession of the client, from seizure by the Commission. The latter, of course, was strongly opposed to any limitations on its investigatory powers under Regulation 17, and drew full attention to the risks of abuse and delaying tactics to which any such rule could give rise.

It was the second Advocate General's opinion[3] by Gordon Slynn which "swung it", if I may use the expression. Sir Gordon (now Lord) Slynn managed to synthesise these two quite different - albeit cognate - ideas of "legal professional privilege" and "secret professionnel" under the single rubric of "the rights of the defence", which everyone could understand. Sir Gordon argued that the right to consult one's lawyer in private, and to protect the confidentiality of the lawyer's advice, is an essential element in the effective exercise of the "rights of defence", itself a principle recognised in all Member States.

The Court, at §23 of the AM&S judgment, had no difficulty in recognising this principle in respect of all written communications exchanged between client and independent lawyer **after** the initiation of the administrative procedure under Regulation 17. To common lawyers this would be recognisable not just as LPP but also as "litigation" privilege. But what of antecedent advice, in the hands of the client, given by the lawyer at the pre-contentious stage, with no administrative proceedings yet on foot? That issue was dealt with by the Court in a single sentence at the end of §23:

"It must also be possible to extend it [i.e. the protection of the confidentiality of written communications between lawyer and client] to earlier written communications between lawyer and client which have a relationship to the subject-matter of that procedure".

On that single sentence hung, in effect, the protection of the confidentiality of legal advice in the hands of the client, following the AM&S judgment. However, to extend the same principle to communications to/from the **in-house lawyer** was, at the time, "a bridge too far". According to the Court, the protection of confidentiality could apply only to communications emanating from an independent lawyer, namely one who was not only subject to the ethics and discipline of his profession but "who is not bound to his client by a relationship of employment" (§27).

And there matters rested until the Akzo judgment.

1 Joined cases T-125/03 and T-253/03 Akzo Nobel Chemicals/Akcros Chemicals v Commission (CFI, 17 September 2007)
2 Case 155/79 AM&S Europe Ltd v Commission [1982] ECR 1575, [1982] 2 CMLR 264
3 Opinion given 26 January 1982 [1982] ECR 1575, [1982] 2 CMLR 264

Akzo: the facts

The facts of Akzo are important. The whole case, ironically enough, seems to have taken place against the background of that company's efforts to introduce a compliance programme. One can understand, perhaps, the company's indignation at the idea that the Commission should be entitled to seize and use against it documents which, according to the company, only came into existence in the context of the company's efforts to comply with the law under a compliance programme implemented on the basis of external legal advice.

In the course of a dawn raid in Manchester, the Commission purported to seize two sets of documents. "Set A" consisted of a memorandum from an Akzo manager to his superior, apparently prepared in the context of the compliance programme, mentioning certain practices which could give rise to competition law problems and proposing certain solutions, together with a second copy of the same memorandum bearing manuscript notes of a telephone conversation a few days later between the manager and an external lawyer, identifying the latter by name. According to the company, the memorandum had been prepared for the purpose of obtaining outside legal advice in connection with the compliance programme.

"Set B" consisted of manuscript notes, prepared by the same manager, of conversations which he had had with employees, for the purposes of preparing the memorandum in Set A. In addition, Set B contained two emails exchanged between the manager and an Akzo in-house lawyer responsible for competition law, who was also a member of the Netherlands Bar.

Apparently a long argument took place in the course of the raid, during which the Commission officials read the documents, although to what extent was disputed. In the event, the Set A documents were put in a sealed envelope for later determination of the issue of privilege. The Set B documents were, according to the Commission, plainly not privileged, and were added directly to the file. The company handed the documents over under protest, the possibility of criminal sanctions under UK legislation having been brought to its attention.

The three main issues considered by the Court were (i) the procedure to be followed where confidentiality – a more appropriate term than "privilege" - is claimed for certain documents; (ii) the kind of documents that are covered by the protection of confidentiality; and (iii) whether the protection extends to communications to/from the company and its in-house lawyers.

No cursory glance

On the first issue, that of procedure, the Commission argued that it was entitled, at the least, to take a "cursory glance" at the documents, in order to decide for itself whether the documents were protected, and to add them to the file if it considered that confidentiality could not be claimed. It was then for the undertaking, if it disagreed, to challenge the matter later.

The Court, however, held, that provided the undertaking gives reasons for its view that the document is protected, it is entitled to refuse to allow the Commission officials to take even "a cursory glance" at the document: to do otherwise might break the very confidentiality the procedure is designed to protect. What must be done, according to the Court, is that the documents must be placed in a sealed envelope, and the Commission must adopt a decision enabling the undertaking to bring the matter before the Court, seeking interim relief from the obligation of disclosure imposed by the decision. Any abuse of this procedure can be penalised by the Commission using its powers under Regulation 1/2003[4].

On the positive side, it can be said that the CFI has now devised a procedural solution which ensures that the Court will decide on whether the documents are protected without the Commission having read them. This requirement should mean that claims will be decided swiftly and unmeritorious claims kept to a minimum. This solution is surely to be welcomed from the point of view of defendant companies, although how it will work out in practice remains to be seen.

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4 Akzo, supra, § 89, cf AM&S at §§ 29 to 32

What is covered?

As regards the detailed arguments as to what is covered by the protection of confidentiality, it is now reaffirmed in the CFI's judgment[5] that the protection extends to written communications between lawyer and client even prior to the administrative procedure, including internal notes which report legal advice given by outside lawyers – as the CFI had, indeed, earlier decided in the Hilti[6] case. The Court also held[7], contrary to the submissions of the Commission, that the protection extends to "working documents and summaries" prepared by the client exclusively for the purpose of seeking independent legal advice, provided that it is "unambiguously clear" that that was, indeed, the purpose for which the document was prepared. In other words, as the Court explicitly stated, if the protection of confidentiality is imposed, in the public interest, for the purpose of enabling the client to seek independent legal advice without constraint, it necessarily follows that the client must be entitled, under the same protection, to provide the lawyer with documents setting out or summarising the information which the lawyer needs in order to give the advice in question[8]. Again, this is a logical application of the principle of confidentiality. The summary will be protected, but of course any pre-existing underlying document (e.g. an incriminating email) will not.

But what is the meaning of drawn up "exclusively" for the purposes of obtaining independent legal advice? On this issue, the Court took a narrow view. According to the Court, the fact that an outside lawyer "has put together or co-ordinated a compliance programme" is insufficient to cover all documents coming into being or drawn up under that programme. In the Akzo case, the Court was not satisfied that the memorandum in Set A had been drawn up exclusively for the purpose of seeking external legal advice. Rather, the Court held, on the facts, the most plausible explanation was that the memorandum had been drawn up to enable the manager concerned to seek his superior's approval for various recommendations concerning the commercial conduct of the company. The subsequent telephone conversation with the lawyer was insufficient to establish that the original purpose of the document was exclusively to seek external legal advice[9].

There is, it seems to me, a dilemma here. One can understand the Court's concern to protect "working documents or summaries" only where they are prepared "exclusively" for seeking legal advice. But, apart from the exact meaning of "exclusively", there is also a Community interest in encouraging "self-policing" in major companies, and enabling the latter "to put their house in order", without exposing themselves to the risk of creating potentially "incriminating" documents. How this dilemma is to be resolved may need further thought and reflection.

The in-house lawyer

As has been seen, in AM&S it was a "close run thing" to get the principle of LPP established at all. Would the CFI, 25 years later, with the accession in the meantime of 17 new Member States, extend LPP to in-house lawyers? The answer from the Court was in the negative.

On the issue whether the emails in Set B between the Akzo manager and the Akzo in-house lawyer were protected, the Court recalled that, in AM&S, the ECJ had expressly excluded lawyers "bound to their clients by a relationship of employment" from the scope of LPP. The CFI followed that ruling, irrespective of the fact that the in-house lawyer may be a member of, and bound by, the ethical rules of the Bar or Law Society. The CFI held that LPP applies only where the lawyer is "structurally, hierarchically and functionally a third party in relation to the undertaking receiving advice"[10].

The CFI found it impossible to extend LPP to in-house lawyers in circumstances where many Member States exclude such lawyers from LPP, and many Member States do not admit in-house lawyers to the Bar. The CFI did not consider that

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5 Akzo, supra, § 117
6 Hilti v Commission [1991] 2 ECR 1439
7 Akzo, supra, §§ 122 to 124
8 Akzo, supra, § 122
9 Akzo, supra, § 128
10 Akzo, supra, § 168

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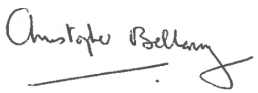
the position had changed sufficiently in the intervening years since 1982, and the "self-assessment" regime introduced by Regulation 1/2003 did not change the position either. According to the CFI, "exercises of self-assessment and strategy definition" can be conducted by an outside lawyer in cooperation with the in-house legal department, with communications between them covered by LPP[11].

One can understand the difficulty in which the CFI was placed, faced on the one hand with the AM&S judgment, and on the other hand with the lack of formal recognition of the role of the in-house lawyer in the legal systems of many Member States. However, one wonders whether this judgment stands up to modern commercial reality. A vast number of modern corporations have extensive in-house legal departments staffed by lawyers who are members of their Bar or Law Society, whose professional obligations take precedence over their obligations to their employer. Very often such lawyers are in the "front line" in securing the undertaking's compliance with the law. One would have thought that it was appropriate to reinforce that role, not undermine it. It is of considerable interest that that was the view strongly put by the intervening parties, including the CCBE, the Netherlands Bar, and the IBA, who represent external and internal lawyers alike.

As to the suggestion that in-house lawyers can always work with outside counsel, one wonders whether it is really justified to require undertakings to go to the extra expense of "doubling up" on their lawyers in order to be sure of protecting something as fundamental as the "rights of defence". As to the possibility of abuse, while that is a legitimate concern, any attempt by an "in-house" lawyer to abuse his/her position would, presumably, be instantly exposed in the course of the interim application which the undertaking would necessarily have to make to the CFI to secure protection of the documents: and the undertaking itself would be exposed to sanctions if the claim was without foundation. One would have thought that few in-house lawyers would wish to risk the personal consequences of finding themselves in such a situation, quite apart from the constraint imposed by the strong sense of ethical conduct with which most modern in-house lawyers are imbued.

It is to be hoped that the Court of Justice will pay close attention to these issues in hearing Akzo's appeal from the CFI's judgment.



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11 Akzo, supra, § 173

For the full Akzo judgment click here.